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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 55.

Albert W. Hamilton, a Minor, by Albert Hamilton, His Guardian Ad Litem, et al.,

Appellants.

vs.

The Regents of the University of California, et al.,

Appellees.

PETITION FOR REHEARING.

JOHN BEARDSLEY,
Rowan Bldg., 5th and Spring Sts., Los Angeles,
Counsel for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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PETITION FOR REHEARING.

Come now the above named appellants, Albert W. Hamilton, a minor, by Albert Hamilton, his guardian *ad litem,* W. Alonzo Reynolds, Jr., a minor, by W. Alonzo Reynolds, his guardian *ad litem,* Albert Hamilton, and W. Alonzo Reynolds, and present this, their petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

I.

The Court seems to have misunderstood counsel's argument that appellants were entitled to a reversal under what we have called our privileges and immunities theory of the law. At page 9 of the opinion as printed in leaflet form by the clerk the Court says:

> "Appellants' contentions are that the enforcement of the order prescribing instructions in military science and tactics abridges some privilege or immunity covered by the first clause" (of the 14th Amendment) "and deprives of liberty safeguarded by the second".

At the top of page 10 the Court says:

> "The 'privilege' of attending the university as a student comes not from federal sources but is given by the state. It is not within the asserted protection. The only 'immunity' claimed by these students is freedom from obligation to comply with the rule prescribing military training."

May we respectfully point out that what the Court refers to in the sentence above quoted as "some privilege or immunity" was set forth at some length in our brief and in the oral argument with such apparent clarity that it did not occur to us that it would be misunderstood. In the brief of appellants what we have called our privileges and immunities argument began on page 14 with the statement in heavy type:

> *"Compulsory membership and service in the Reserve Officers Training Corps abridges the privileges and immunities of appellants as citizens of the United States, in violation of the 14th Amendment."*

We then set forth, first in a series of very brief statements, then in elaboration of the same points the following:

"Stated most concisely, our contentions on this point are as follows:

(a) The Reserve Officers' Training Corps is a branch of the Federal military service, maintained for Federal purposes.

(b) Without authorization by Act of Congress there is no power in the Federal Government (much less the State) to compel service in any branch of the Federal military establishment in time of peace.

(c) This freedom from compulsory membership and service in the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States.

(d) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. (14th Amendment.)

(e) If it is said that the priveleges and immunities of appellants are not abridged because they are not actually being compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and

(f) No State may impose, as a condition upon which it will extend a privilege which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States."

May we consider briefly with the Court the proposition above designated (c)?

> "(c) *This freedom from compulsory membership and service in the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States.*"

Perhaps we were unwise in adhering to the language of the 14th Amendment and describing our claim of freedom from enforced service in time of peace in the Federal military establishment as a "privilege and immunity" of citizens of the United States. Our thought was that the freedom we were contending for consists of the *privilege of* exemption from enforced service in time of peace, and an *immunity from* such enforced service in time of peace. It had not occured to us that the Court would think we were arguing that the "privilege" of attending the university as a student was the "privilege and immunity" which we were contending is abridged by enforced service in a branch of the Federal military establishment in time of peace. We have not at any time doubted that "the 'privilege' of attending the university as a student comes not from Federal sources but is given by the state". Nor have we doubted that that "privilege" is not within the asserted protection of the 14th Amendment.

The Court in its opinion goes on to say:

> "The only 'immunity' claimed by these students is freedom from obligation to comply with the rule prescribing military training."

We respectfully suggest that a more accurate statement of what is the "only immunity" claimed by these students is that it is freedom from the obligation to comply with the rule prescribing compulsory membership and service *in the Reserve Officers Training Corps which is a branch or unit or subdivision of the Federal government's military establishment.* We use the term "Federal military establishment" in contradistinction to the state military establishment which would include the State Militia, and any other military organization maintained by the state. On this point we quote from the Court's opinion at page 8:

> "The petition is not to be understood as showing that students required by the regents' order to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States."

We concur immediately in the judgment that the students do not "serve in the army". We respectfully urge, however, that the petition *is* to be understood as showing that students required by the regents' order to take the prescribed course thereby become a part of the military establishment of the United States.

The Federal Statutes.

The Reserve Officers Training Corps is established, created, and set up by section 381 of chapter 20 of title 10 of the United States Code Annotated, which is found in volume 10 of that code, bearing the general title "Army". The code is the "Code of the Laws of the United States", as enacted by Congress and approved in June, 1926, and incorporating all the laws of a general and permanent nature in force at the beginning of that session, that is, December, 1925. All existing laws are logically arranged under fifty titles. Title 10 is "Army". Chapter 20 thereof is entitled "Reserve Forces". Sections 351 to 371 inclusive deal with the "Officers' Reserve Corps." Sections 381 to 390, inclusive, deal with "Reserve Officers' Training Corps". Section 381 is entitled "Establishment of Training Corps." It authorizes the president to establish and maintain units of a Reserve Officers' Training Corps in civil educational institutions, including state universities and the land grant colleges established under the Morrill Law approved by President Lincoln July 2, 1862. It authorizes compulsory or elective courses in military training *at institutions other than state universities and land grant colleges.* It does not authorize compulsory military training in land grant colleges. The language of the section on that point is:

> *"Provided further,* that except at state institutions described in this section, no unit shall be established or maintained in any educational institution until the authorities of the same agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically

> fit male students, which course, when entered upon by any student, shall, as regards such student, be a prerequisite for graduation unless he is relieved of this obligation by regulations to be prescribed by the Secretary of War."

Thus we see that Congress has carefully refrained from authorizing compulsory military training at the land grant colleges, of which the University of California is one. Upon this point the law appears to have remained unchanged, since the enactment of the Morrill law.

Section 382 of chapter 20 is entitled "Eligibility to Membership" and limits membership "to students of institutions in which units of such corps may be established who are citizens of the United States, who are not less than 14 years of age, and whose bodily condition indicates that they are physically fit to perform military duty, or will be so upon arrival at military age".

Section 383 provides for admission of medical, dental and veterinary students to training corps for a course at the rate of ninety hours of instruction per annum for the four collegiate years.

Section 386a provides that advanced training need not follow immediately the two years' course in the colleges, showing again that the R. O. T. C. is completely controlled by the Federal government.

All of the sections above quoted seem to establish beyond doubt that the *Reserve Officers' Training Corps* is a part of the military establishment of the United States, and we respectfully submit that it is equally clear that students who are members of the R. O. T. C. do thereby "become a part of the military establishment of the United States".

The War Department Controls the R. O. T. C.

Now, in the opinion of the Court in the case at bar at page 8, as printed by the clerk, immediately following the statement that the petition is not to be understood as showing that students required by the regents' order to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States, we find this language:

> "Nor is the allegation that the courses are prescribed by the War Department to be taken literally. We take judicial notice of the long-established voluntary cooperation between federal and state authorities in respect of the military instruction given in the land grant colleges. *The War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions. The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the State.*" (Italics ours.)

That may be a fair statement of the law as it was at some time in the past. Possibly it was the law governing land grant colleges and military training therein during the time when Mr. Justice Butler was a member of the board of regents of the University of Minnesota, which is a state university and which we understand is a land grant college. However, the law as it is today does not seem to support the statements of the Court just above quoted.

Section 385 of chapter 20 reads as follows:

> *"Courses of training.* The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of said corps shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training or to devote at least an average of three hours per week per academic year to such military training except as provided in sections 383 and 384 of this title."

In the face of that section, how can it be said that the allegation that the courses are prescribed by the War Department is not to be taken literally? How can it be said that "the War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions?" It seems to us to be fair to assume that the statements of the Court above quoted were deemed by the Court to be statements of vital importance and to constitute a part of a valid basis for the Court's decision. We have shown, we think conclusively, that those statements are not an adequate or correct statement of the law and the facts. If we are correct, then we are confident that the Court will be glad to reconsider its decision and to grant us a rehearing. The Court speaks of the "long established voluntary cooperation between Federal and state authorities in respect of the military instruction given in the land grant

colleges." There can be no question but that there has been voluntary cooperation. But that fact does not alter the fact that the courses in military instruction as prescribed by the Secretary of War are required to be given in all educational institutions maintaining units of the R. O. T. C.

Again, the Court says this:

> "The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the state."

How can it be said that the training is "exclusively prescribed and given under the authority of the state" when we have before us section 385 as quoted above?

At the University of California until about 1917 military training was required in the so-called "University Cadets." That was distinctly and exclusively a California and University of California military organization. But about 1917 the War Department at the request of the regents of the university established units of the R. O. T. C. in California. The courses had been compulsory in the University Cadets and were made compulsory in the R. O. T. C. Whether the same is true of the University of Minnesota during the time when Mr. Justice Butler was a regent of that university, we do not know.

The Asserted State Authority Conflicts With Federal Power.

On page 9 of the opinion, the Court, after mentioning that the states are interested in the safety of the United States, the strength of its military forces and its readiness to defend them in war, and that the state has authority to train its citizens for military service, the Court says:

> "And, when made possible by the national government, the state in order more effectively to teach and train its citizens for these and like purposes may avail itself of the services of officers and equipment belonging to the military establishment of the United States."

Of course that is true. It always has been true. Long before the establishment of the R. O. T. C. it was the practice of the states to do just that. Then the Court says:

> "So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government and transgresses no right safeguarded to the citizens by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends."

May we analyze that sentence briefly? Is the state's action within its retained powers when its action consists in coercing its young men citizens to join and serve in

the R. O. T. C. which we have shown is a branch of the Federal government's military establishment? Did the states when they ratified the Constitution, "retain" any power to trespass upon the exclusive authority of the Federal government in its field of raising, equipping, supplying and maintaining armies? Is it not clear that that power belongs exclusively to the Federal government?

And is not the imposing of compulsory service in the R. O. T. C. "inconsistent with" an "exertion of the authority of the national government?" Is it not clearly inconsistent with the authority of the national government, which has always carefully refrained from making military training in land grant colleges compulsory and even from authorizing such colleges to make military training compulsory, for the state to enforce a requirement that students must render service to the Federal government in training for war in a military organization which is established and controlled by the War Department?

Under Federal law, enlistment in the military academy at West Point is voluntary, as are all enlistments in the Federal military establishment in time of peace. Suppose the regents of the University of New York were to impose a requirement that students take a summer course in the nearby military academy. Would any court sustain such action as "not inconsistent with any exertion of the authority of the national government?" Would any court say that the state government may enforce military training in the United States military academy? The R. O. T. C. is as completely within the control of Congress and the War Department as is the West Point Academy.

And finally, in the sentence just above quoted from the opinion, the Court says that so long as the state action "transgresses no right safeguarded to the citizen by the Federal Constitution, the state is the sole judge of the means to be employed," etc. We maintain that compelling young men to surrender their immunity from compulsory service in time of peace in a branch of the Federal military establishment does transgress a right safeguarded to the citizen by the Federal Constitution. In effect, the regents of the University of California say to our appellants and to all students in their classification: "You will either surrender your immunity from enforced service in a branch of the Federal military establishment in time of peace or we will suspend you from your state university." And that is exactly what has been done in this case. We agree, speaking generally, that the state is the sole judge of the means employed and the amount of training to be exacted from students. But we insist that that fact does not warrant the state, through the regents, in demanding the surrender of the "privilege and immunity" of freedom from enforced service in any branch of the military establishment in time of peace.

Asserted Violations of Due Process Clause and of Privileges and Immunities Clause Are Distinct Grounds for Reversal.

We regret deeply that we seem to have failed to make clear to the Court that it was that "privilege and immunity" that we were contending for, and that the thought never entered our minds that the "privilege" of attending the university as a student comes from Federal sources. Of course that "privilege" is given by the state, but the "immunity" for which we have been contending is safeguarded by the privileges and immunities clause of the 14th amendment. On page 10 the Court says:

> "But that 'immunity' cannot be regarded as not within, or as distinguishable from, the 'liberty' of which they claim to have been deprived by the enforcement of the regents' order. If the regents' order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause. Therefore we need only decide whether by state action the 'liberty' of these students has been infringed."

Again we feel ourselves contrained to point out, most respectfully, that we seem to have failed to make clear our contentions. To us it seems utterly clear that the "immunity" for which we are contending is not within, and is sharply distinguishable from, the liberty of conscience and of religion, of which appellants claim to have been deprived by the enforcement of the regents' order. The two propositions of law are completely separate and distinct. The "liberty" we invoke is the religious freedom guaranteed by the 1st amendment against invasion by Congress and guaranteed, as we believe, necessarily, by

the 14th amendment against invasion by the states. There is no connection whatever between that religious freedom and the "privilege and immunity" of freedom from enforced service in a branch of the Federal military establishment in time of peace. And so we must respectfully urge that even though the regents' order is not repugnant to the due process clause, and even though it does not deprive appellants of their liberty without due process of law by invading their freedom of religion, it *does* violate the privileges and immunities clause in the manner in which we have so often herein, in our brief and in our oral argument, pointed out. Also, we must respectfully urge that the function of this most Honorable Court is not only to decide whether by state action the "liberty" of the students has been infringed. We urge that it is the opportunity and the duty of the Court to decide whether by state action the privileges and immunities of these appellants have been abridged.

Further down on page 10 the Court says:

> "California has not drafted or called them to attend the university. They are seeking education offered by the state and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance."

Again with apologies for the necessity imposed upon us of differing from the Court, we point out that in our petition for mandate in the State Court we alleged that our students had petitioned for exemption from compulsory military drill upon the sole ground of their conscientious and religious objections. And that was true. That was the only ground upon which these young men were willing to stand in their dealings with their university. But we contended strenuously in the Court below and in this Court that our students not only were warranted in taking their stand by their religious and conscientious scruples but that they were protected in their stand thus taken by the privileges and immunities clause of the 14th amendment.

The zeal of the regents of the University of California for compulsory military training is understandable. Their position is the position taken uniformly by regents of land grant colleges throughout the country. Wisconsin and Minnesota have recently removed the compulsion and permitted students to take or leave the course in military science and tactics and the drill in the R. O. T. C. With the exception of Minnesota and Wisconsin Universities, all the land grant colleges still enforce compulsory military training. For providing the training (not for enforcing it) they receive Federal aid through the Department of the Interior. If their stipend from the United States is proportioned to the number of men in training, we need look no farther for a cogent reason for their insisting that all who may be forced to take the courses shall do so.

The Court Is Not Concerned With Legislative Policy.

In the brief filed *amicus curiae* by Professor Johnson of the University of Illinois in opposition to appellants, the statement is made that removal of the compulsion to drill would cut down military training by 60 per cent. If so, the insistence by the board of regents upon the compulsory feature becomes the more readily understandable. But, as is pointed out by Mr. Justice Cardozo in his concurring opinion herein,

> "In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law."

Congress, and Congress alone, can lawfully require compulsory service in a branch of the Federal military establishment. If the Court shall sustain our contentions under the head "privileges and immunities," Congress can prevent immediately the decimation of the student soldier ranks by passing a law requiring, or even authorizing compulsory training in the R. O. T. C. This *is* a matter of "legislative policy," and Congress makes the policy. The Court is not concerned with the wisdom of the policy. University regents have concerned themselves with it, but it is our contention that in doing so they have invaded the exclusive field of Congress, as spokesman for the people of the nation. In this connection we point out also that the legislative policy here involved is not "unrelated to privileges or liberties secured by the organic

law." We have shown that the "privileges" and immunities upon which appellants rely *are* secured by the organic law.

On page 7 of the opinion the Court says:

> "The allegations of the petition" (for mandate in the Supreme Court of California) "do not mean that California has divested itself of any part of its power solely to determine what military training shall be offered or required at the university."

That is true. But the allegations of the petition do mean the regents may not impose as a price for the education to which appellants are entitled as residents of California, the surrender of their immunity, under the Constitution and laws of the United States, from enforced service in any branch of the Federal military establishment in time of peace. The regents undoubtedly may determine what military training may be required. But that right may not be exercised arbitrarily or unreasonably. And we submit that it is arbitrary and unreasonable to compel appellants to surrender their privilege and immunity under Federal statutes and the Constitution from enforced peace-time service in the *Federal* military establishment.

R. O. T. C. Is Unquestionably a Part of the National Forces, Which Are Controlled Exclusively by Congress.

The opinion holds that appellants are not required "in any sense to become a part of the military establishment of the United States." We insist that they are subjected to exactly that requirement. But suppose we take another viewpoint. Section I of Title 10 U. S. C. A. is as follows:

> "Section 1. *National forces; persons liable to perform military duty.* All able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

Certainly we can agree that only Congress can compel an alteration of the status of appellants as members of the "national forces." They were such members *before* they entered the university. As such they were subject to call, not of the state, but of the national government. The national government did not say to them: "You must now take an affirmative step as a member of the national forces and submit to compulsory training for war." No.

That command was given to them by the state of California, speaking through the university regents. Does the state have the authority, the power, to compel such submission? If training at the university were in a *state* military unit, an affirmative answer must be given. But isn't it clear that the state invades the Federal field when it commands young men to take military training in the Federal Government's Reserve Officers' Training Corps? The Federal government is making no such demand. Suppose more students submitted themselves for training than the United States Army officers in command could handle satisfactorily, and those officers called a halt on the incoming hordes seeking military training. Could the state, through the regents, force its students into the R. O. T. C. against the will of the War Department? Of course not! Why? Because the R. O. T. C. is established, supported and controlled by the Federal Government. It is a part of the government's machinery for building up its armies. It certainly is a part of *some* military establishment. Would any one—even a university regent—contend that it is a part of the state of California's military establishment? And would anyone, after reading the laws of the United States as hereinabove set forth, contend that the War Department does not govern it, and prescribe, authoritatively, the courses of instruction?

The Novel and Important Federal Question Remains Unanswered.

Our "privileges and immunities" argument, as presented in our brief and orally before the Court, may we respectfully point out, has not been met. We supported it with decisions of this Court, conclusively showing that a state may not impose as a price for a privilege which it may at its pleasure grant or withhold, the surrender of rights guaranteed by the Constitution and laws of the United States to citizens of the United States. When counsel had the privilege of presenting his petition for appeal to Mr. Justice Sutherland in chambers on April 6, 1934, that distinguished jurist allowed the appeal, and added a memorandum in which he stated that the case, on its merits, presented a "novel and important" Federal question. What was that question? To counsel who had propounded it, it was whether compulsory military training in the R. O. T. C., a branch of the Federal military establishment, abridges the privileges and immunities of appellants in violation of the 14th amendment. Stated differently, the question was whether or not the regents of the University of California may impose as a price for education, the surrender of rights belonging to appellants as citizens of the United States under the Constitution and laws of the United States. The "novel and important" question was not whether compulsory military service of any nature violated the due process clause by abridging freedom of religion. That question had been answered in the negative in the *Macintosh* case. Nor was the question whether conscientious objectors to compulsory military training in land grant colleges had the right to exemption upon the grounds of religion and conscience. That had

been answered in the negative by the Maryland Court of Appeals in *Coale v. Pearson,* and this Court had dismissed an appeal from that judgment for want of a substantial Federal question.

Most respectfully we urge that the millions of peace lovers in America who oppose compulsory military training in tax supported land grant colleges are entitled to an authoritative, understanding well considered answer by this Honorable Court to the question:

May a state university, which is a land grant college, impose as a price for the education to which they are in all other respects entitled by law, the surrender of students' immunity, by virtue of the laws and Constitution of the United States, from compulsory service, in time of peace, in any branch of the Federal military establishment?

We contend that it may not. And with the deepest faith we urge the Court to permit the cause to be reargued, to the end that justice may be achieved.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of California be, upon further consideration, reversed.

Respectfully submitted,

JOHN BEARDSLEY,
Counsel for Appellants.

Certificate of Counsel.

I, John Beardsley, counsel for the above named appellants, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

JOHN BEARDSLEY,
Counsel for Appellants.